APPENDIX

APPENDIX

APPENDIX A.

Findings of Fact and Conclusions of Law.

UNITED STATES DISTRICT COURT,

FOR THE SOUTHERN DISTRICT OF OHIO,

WESTERN DIVISION.

HERBERT S. MILLER, 703 Delta Avenue, Cincinnati, Ohio, for the benefit of himself and all persons similarly situated,

Plaintiff,

vs.

J. J. GILLIECE and W. K. WELLS, personally and as representatives of all members of the Brotherhood of Railroad Trainmen and THE PENNSYLVANIA RAILROAD,

Defendants.

No. 3564.

Findings of Fact.

Upon consideration of the motions to dismiss by the defendants herein the court makes the following findings of fact:

1. The plaintiffs are and have been for more than five years employees of the defendant, The Pennsylvania Railroad Company, and have been employed as operating employees by the said Railroad Company, and have been employed as operating employees by the said Railroad principally on the lines running out of Cincinnati, Ohio.

2. The defendant, Brotherhood of Railroad Trainmen, is a voluntary railroad labor organization, certified under the Railway Labor Act to represent operating employees

of The Pennsylvania Railroad Company, employed to operate its trains on its various railroad lines, which organization has offices in the City of Cleveland, State of Ohio, with local lodges or unions in many parts of the country, including Lodge Number 148 in the City of Cincinnati, Ohio, the named defendants, J. J. Gilliece and W. K. Wells, being members of and officers of the said union of Brotherhood of Railroad Trainmen and said Lodge Number 148.

3. The defendant, The Pennsylvania Railroad Company, is a corporation maintaining railroad lines in several states, including the State of Ohio and the County of Hamilton, and is engaged in the business of interstate carrier of freight and passengers, and employs the plaintiffs as operating employees.

4. On March 26, 1952, the Brotherhood of Railroad Trainmen, a voluntary railroad labor organization, defendant herein, entered into a union shop agreement with the defendant, The Pennsylvania Railroad Company, which became effective on April 1, 1952, a copy of said agreement being hereto attached, marked "Exhibit A" and made a part hereof.

5. Plaintiffs were members of the said Brotherhood of Railroad Trainmen at the time the said union shop agreement was entered into, and at the time it became effective; and were then employees of The Pennsylvania Railroad Company.

6. Plaintiffs subsequently in 1952 and 1953 permitted their membership to lapse by failing to pay their required dues to the Brotherhood of Railroad Trainmen, and were cited by the said Brotherhood to The Pennsylvania Railroad Company as having failed to qualify for employment under the said union shop agreement.

7. The defendant, Brotherhood of Railroad Trainmen, has refused to reinstate the plaintiffs, and has denied them

membership in said organization since their voluntary withdrawal from membership, although each of said plaintiffs had, prior to the institution of this action, made application for membership or reinstatement.

8. Plaintiffs were members of the United Railroad Operating Crafts, a voluntary labor organization prior to their withdrawal from the Brotherhood of Railroad Trainmen, and have maintained membership in said United Railroad Operating Crafts to the present date. The System Board of Adjustment of The Pennsylvania Railroad Company, constituted pursuant to the terms of the said union shop agreement, found upon hearing that membership in the United Railroad Operating Crafts did not constitute compliance with the said union shop agreement, which finding was in respect to each of the plaintiffs.

9. After said finding the defendant, The Pennsylvania Railroad Company, discharged each of the plaintiffs as of January 7, 1955, and they were subsequently restored to their respective places of employment by reason of the temporary restraining order heretofore instituted in this action by the State Court.

Conclusions of Law.

From the foregoing facts and by reason of the provisions of the United States Code, Title 45, Section 151, *et seq.*, the Court concludes and finds as a conclusion of law that the complaint of the plaintiffs fails to set forth claims on which the relief which plaintiffs seek in their prayer can be granted and is without jurisdiction to determine the questions raised by the complaint.

Let judgment be entered accordingly.

United States District Judge.

Dated: this day of August, 1955.

Order Sustaining Motions to Dismiss.

UNITED STATES DISTRICT COURT,

FOR THE SOUTHERN DISTRICT OF OHIO,

WESTERN DIVISION.

HERBERT S. MILLER, 703 Delta Avenue, Cincinnati, Ohio, for the benefit of himself and all persons similarly situated,

Plaintiff,

vs.

J. J. GILLIECE and W. K. WELLS, personally and as representatives of all members of the Brotherhood of Railroad Trainmen and THE PENNSYLVANIA RAILROAD,

Defendants.

No. 3564

This cause coming on to be heard on the motions of the respective defendants herein to dismiss the proceeding was argued by counsel for the respective parties, and submitted to the court on briefs; upon consideration whereof the court finds the said motions well taken and sustains the same on the ground the complaint fails to state a claim upon which relief can be granted, and the court is without jurisdiction to hear the matter.

IT IS THEREFORE CONSIDERED AND ORDERED BY THE COURT: that this proceeding should be, and it hereby is, dismissed upon the ground that plaintiffs' complaint fails to state a claim upon which relief can be granted, and the court is without jurisdiction to grant the relief sought in the complaint.

The temporary restraining order heretofore granted to the plaintiffs in the Court of Common Pleas for Hamilton County, Ohio, is hereby dissolved.

To the foregoing ruling of the court plaintiffs except.

APPENDIX B.

Order.

No. 12,679.

UNITED STATES COURT OF APPEALS,

FOR THE SIXTH CIRCUIT.

HERBERT S. MILLER, 703 Delta Avenue, Cincinnati, Ohio, For the Benefit of Himself and All Persons Similarly Situated,

Appellants,

v.

J. H. GILLIECE and W. K. WELLS, Personally and as Representatives of all Members of the Brotherhood of Railroad Trainmen and THE PENNSYLVANIA RAILROAD,

Appellees.

Before: SIMONS, Chief Judge; MCALLISTER and STEWART, Circuit Judges.

The above cause coming on to be heard upon the transcript of the record, the briefs of the parties, and the argument of counsel in open court, and the Court being duly advised,

Now, therefore, it is ordered, adjudged, and decreed that the judgment of the district court be and is hereby affirmed upon the authority of *Pigott v. Detroit, Toledo & Ironton Railroad Co.*, 221 F. 2d 736 (C.A. 6).

Approved for entry:

/s/ THOMAS F. McALLISTER,
United States Circuit Judge.

APPENDIX C.

Relevant Statutory Provisions.

Sections 2 and 3 of Title I of the Railway Labor Act, as amended (48 Stat. 1186, 1189, 64 Stat. 1238; 45 U. S. C. §§152, 153) provide in part as follows:

"Section 2. * * *

"Eleventh. Notwithstanding any other provisions of this Act, or of any other statute or law of the United States, or Territory thereof, or of any State, any carrier or carriers as defined in this Act and a labor organization or labor organizations duly designated and authorized to represent employees in accordance with the requirements of this Act shall be permitted—

"(a) to make agreements, requiring, as a condition of continued employment, that within sixty days following the beginning of such employment, or the effective date of such agreements, whichever is the later, all employees shall become members of the labor organization representing their craft or class: Provided, That no such agreement shall require such condition of employment with respect to employees to whom membership is not available upon the same terms and conditions as are generally applicable to any other members or with respect to employees to whom membership was denied or terminated for any reason other than the failure of the employee to tender the periodic dues, initiation fees, and assessments (not including fines and penalties) uniformly required as a condition of acquiring or retaining membership.

"(b) to make agreements providing for the deduction by such carrier or carriers from the wages of its or their employees in a craft or class and payment to the labor organization representing the craft or class of such em-

ployees, of any periodic dues, initiation fees, and assessments (not including fines and penalties uniformly required as a condition of acquiring or retaining membership: Provided, That no such agreement shall be effective with respect to any individual employee until he shall have furnished the employer with a written assignment to the labor organization of such membership dues, initiation fees, and assessments, which shall be revocable in writing after the expiration of one year or upon the termination date of the applicable collective agreement, whichever occurs sooner.

"(c) The requirement of membership in a labor organization in an agreement made pursuant to sub-paragraph (a) shall be satisfied, as to both a present or future employee in engine, train, yard, or hostling service, that is, an employee engaged in any of the services or capacities covered in section 3, First (h) of this Act defining the jurisdictional scope of the First Division of the National Railroad Adjustment Board, if said employee shall hold or acquire membership in any of the labor organizations, national in scope, organized in accordance with this Act and admitting to membership employees of a craft or class in any of said services; and no agreement made pursuant to subparagraph (b) shall provide for deductions from his wages for periodic dues, initiation fees, or assessments payable to any labor organization other than that in which he holds membership: Provided, however, That as to an employee in any of said services on a particular carrier at the effective date of any such agreement on a carrier, who is not a member of any one of the labor organizations, national in scope, organized in accordance with this Act and admitting to membership employees of a craft or class in any of said services such employee, as a condition of continuing his employment may be required to become a member of the organization representing the craft in which

he is employed on the effective date of the first agreement applicable to him; Provided, further, That nothing herein or in any such agreement or agreements shall prevent an employee from changing membership from one organization to another organization admitting to membership employees of a craft or class in any of said services.

"(d) Any provisions in paragraphs Fourth and Fifth of section 2 of this Act in conflict herewith are to the extent of such conflict amended."

"SEC. 3. First. There is hereby established a Board, to be known as the 'National Railroad Adjustment Board,' the members of which shall be selected within thirty days after approval of this Act, and it is hereby provided—

"(a) That the said Adjustment Board shall consist of thirty-six members, eighteen of whom shall be selected by the carriers and eighteen by such labor organizations of the employees, national in scope, as have been or may be organized in accordance with the provisions of section 2 of this Act.

"(b) The carriers, acting each through its board of directors or its receiver or receivers, trustee or trustees, or through an officer or officers designated for that purpose by such board, trustee or trustees, or receiver or receivers, shall prescribe the rules under which its representatives shall be selected and shall select the representatives of the carriers on the Adjustment Board and designate the division on which each such representative shall serve, but no carrier or system of carriers shall have more than one representative on any division of the Board.

"(c) The national labor organizations as defined in paragraph (a) of this section, acting each through the chief executive or other medium designated by the organization or association thereof, shall prescribe the rules under which the labor members of the Adjustment Board

shall be selected and shall select such members and designate the division on which each member shall serve; but no labor organization shall have more than one representative on any division of the Board.

"(d) In case of a permanent or temporary vacancy on the Adjustment Board, the vacancy shall be filled by selection in the same manner as in the original selection.

"(e) If either the carriers or the labor organizations of the employees fail to select and designate representatives to the Adjustment Board, as provided in paragraphs (b) and (c) of this section, respectively, within sixty days after the passage of this Act, in case of any original appointment to office of a member of the Adjustment Board, or in any case of vacancy in any such office within thirty days after such vacancy occurs, the Mediation Board shall thereupon directly make the appointment and shall select an individual associated in interest with the carriers or the group of labor organizations of employees, whichever he is to represent.

"(f) In the event a dispute arises as to the right of any national labor organization to participate as per paragraph (c) of this section in the selection and designation of the labor members of the Adjustment Board, the Secretary of Labor shall investigate the claim of such labor organization to participate, and if such claim in the judgment of the Secretary of Labor has merit, the Secretary shall notify the Mediation Board accordingly, and within ten days after receipt of such advice the Mediation Board shall request those national labor organizations duly qualified as per paragraph (c) of this section to participate in the selection and designation of the labor members of the Adjustment Board to select a representative. Such representatives, together with a representative likewise designated by the claimant, and a third or neutral party designated by the Mediation Board, constituting a board of

three, shall within thirty days after the appointment of the neutral member investigate the claims of the labor organization desiring participation and decide whether or not it was organized in accordance with section 2 hereof and is likewise properly qualified to participate in the selection of the labor members of the Adjustment Board, and the findings of such boards of three shall be final and binding.

"(g) Each member of the Adjustment Board shall be compensated by the party or parties he is to represent. Each third or neutral party selected under the provisions of (f) of this section shall receive from the Mediation Board such compensation as the Mediation Board may fix, together with his necessary traveling expenses and expenses actually incurred for subsistence, or per diem allowance in lieu thereof, subject to the provisions of law applicable thereto, while serving as such third or neutral party.

"(h) The said Adjustment Board shall be composed of four divisions, whose proceedings shall be independent of one another, and the said divisions as well as the number of their members shall be as follows:

"First division: To have jurisdiction over disputes involving train and yard-service employees of carriers; that is, engineers, firemen, hostlers, and outside hostler helpers, conductors, trainmen, and yard service employees. This division shall consist of ten members, five of whom shall be selected and designated by the carriers and five of whom shall be selected and designated by the national labor organizations of the employees.

"Second division: To have jurisdiction over disputes involving machinists, boilermakers, blacksmiths, sheet-metal workers, electrical workers, car men, the helpers and apprentices of all the foregoing, coach cleaners, powerhouse employees, and railroad-shop laborers. This division shall

consist of ten members, five of whom shall be selected by the carriers and five by the national labor organizations of the employees.

"Third division: To have jurisdiction over disputes involving station, tower, and telegraph employees, train dispatchers, maintenance-of-way men, clerical employees, freight handlers, express, station, and store employees, signal men, sleeping-car conductors, sleeping-car porters, and maids and dining-car employees. This division shall consist of ten members five of whom shall be selected by the carriers and five by the national labor organization of employees.

"Fourth division: To have jurisdiction over disputes involving employees of carriers directly or indirectly engaged in transportation of passengers or property by water, and all other employees of carriers over which jurisdiction is not given to the first, second, and third divisions. This division shall consist of six members, three of whom shall be selected by the carriers and three by the national labor organizations of the employees.

"(i) The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on the date of approval of this Act, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes.

"(j) Parties may be heard either in person, by counsel, or by other representatives, as they may respectively elect, and the several divisions of the Adjustment Board shall give due notice of all hearings to the employee or employees and the carrier or carriers involved in any disputes submitted to them.

"(k) Any division of the Adjustment Board shall have authority to empower two or more of its members to conduct hearings and make findings upon disputes, when properly submitted, at any place designated by the division: Provided, however, That final awards as to any such dispute must be made by the entire division as hereinafter provided.

"(l) Upon failure of any division to agree upon an award because of a deadlock or inability to secure a majority vote of the division members, as provided in paragraph (n) of this section, then such division shall forthwith agree upon and select a neutral person, to be known as 'referee,' to sit with the division as a member thereof and make an award. Should the division fail to agree upon and select a referee within ten days of the date of the deadlock or inability to secure a majority vote, then the division, or any member thereof, or the parties or either party to the dispute may certify that fact to the Mediation Board, which Board shall, within ten days from the date of receiving such certificate, select and name the referee to sit with the division as a member thereof and make an award. The Mediation Board should be bound by the same provisions in the appointment of these neutral referees as are provided elsewhere in this Act for the appointment of arbitrators and shall fix and pay the compensation of such referees.

"(m) The awards of the several divisions of the Adjustment Board shall be stated in writing. A copy of the awards shall be furnished to the representative parties to

the controversy, and the awards shall be final and binding upon both parties to the dispute, except in so far as they shall contain a money award. In case a dispute arises involving an interpretation of the award the division of the Board upon request of either party shall interpret the award in the light of the dispute.

"(n) A majority vote of all members of the division of the Adjustment Board shall be competent to make an award with respect to any dispute submitted to it.

"(o) In case of an award by any division of the Adjustment Board in favor of petitioner, the division of the Board shall make an order, directed to the carrier, to make the award effective and, if the award includes a requirement for the payment of money, to pay the employee the sum of which he is entitled under the award on or before a day named.

"(p) If a carrier does not comply with an order of a division of the Adjustment Board within the time limit in such order, the petitioner, or any person for whose benefit such order was made, may file in the District Court of the United States for the district in which he resides or in which is located the principal operating office of the carrier, or through which the carrier operates, a petition setting forth briefly the causes for which he claims relief, and the order of the division of the Adjustment Board in the premises. Such suit in the District Court of the United States shall proceed in all respects as other civil suits, except that on the trial of such suit the findings and order of the Adjustment Board shall be *prima facie* evidence of the facts therein stated, and except that the petitioner shall not be liable for costs in the district court nor for costs at any subsequent stage of the proceedings, unless they accrue upon his appeal, and such costs shall be paid out of

the appropriation for the expenses of the courts of the United States. If the petitioner shall finally prevail he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit. The district courts are empowered, under the rules of the court governing actions at law, to make such order and enter such judgment, by writ of mandamus or otherwise, as may be appropriate to enforce or set aside the order of the division of the Adjustment Board.

"(q) All actions at law based upon the provisions of this section shall be begun within two years from the time the cause of action accrues under the award of the division of the Adjustment Board, and not after.

* * *

"Second. Nothing in this section shall be construed to prevent any individual carrier, system, or group of carriers and any class or classes of its or their employees, all acting through their representatives, selected in accordance with the provisions of this Act, from mutually agreeing to the establishment of system, group, or regional boards of adjustment for the purpose of adjusting and deciding disputes of the character specified in this section. In the event that either party to such a system, group, or regional board of adjustment is dissatisfied with such arrangement, it may upon ninety days' notice to the other party elect to come under the jurisdiction of the Adjustment Board."

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 331

HERBERT S. MILLER, for the benefit of himself and all persons similarly situated, *Petitioners,*

v.

J. J. GILLIECE AND W. K. WELLS, personally and as representatives of all members of the BROTHERHOOD OF RAILROAD TRAINMEN, AND THE PENNSYLVANIA RAILROAD, *Respondents.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF FOR RESPONDENT BROTHERHOOD OF RAILROAD TRAINMEN IN OPPOSITION

The respondent Brotherhood of Railroad Trainmen opposes the grant of the petition for a writ of certiorari in this case since the judgment below is sustainable on grounds differing from those raised in the petition, grounds which do not merit review by this Court. The issues presented by the petition for certiorari did not grow out of the complaint and

are predicated upon a cause of action injected into the case after the complaint was filed and without the complaint ever having been amended. The action of the District Court in dismissing the case was based solely upon the complaint as filed. That action was so clearly correct and so clearly devoid of any issue meriting the review of this Court as to warrant the denial of the petition for certiorari.

STATEMENT

Petitioners filed a petition or complaint in the Court of Common Pleas, Hamilton County, Ohio, seeking a mandatory injunction restraining representatives of the Brotherhood of Railroad Trainmen and the Pennsylvania Railroad from (1) discharging or suspending petitioners for non-membership in the Brotherhood until they have been given an opportunity for readmission, (2) discharging or suspending petitioners from their employment with the Pennsylvania, and (3) discriminating against petitioners insofar as seniority rights were concerned. R. 2a-8a. A copy of that complaint is attached as an Appendix hereto, *infra,* p. 1a.

The complaint alleged that the petitioners allowed their membership in the Brotherhood to lapse during the years 1952 and 1953 "and were cited by the defendant labor organization for non-membership; the plaintiff and his fellow employees have applied for reinstatement in the defendant B. R. T." (R. 4a, 5a). It was asserted that the Brotherhood and the individual respondents had forced the Pennsylvania to discharge the petitioners. (R. 5a). And it was alleged that the refusal of the Brotherhood to reinstate the petitioners and the discharge from employment for

such lack of membership was contrary to the Railway Labor Act, "which provides in Section 2, Eleventh (a) that membership in a labor organization cannot be required as a condition of continued employment." (R. 5a).

But the complaint failed to set forth facts indicating that it was obligatory on the Brotherhood to reinstate the petitioners after their acknowledged failure to maintain their former membership. And there was no averment that membership in the Brotherhood was a required condition of employment of the petitioners by the Pennsylvania or that membership or non-membership in the Brotherhood could in any way affect the employment of petitioners by the railroad. The complaint, moreover, did not mention and failed to negate the existence of a union shop agreement as sanctioned by the provisions of the Railway Labor Act. Nor was there any allegation that the petitioners had tendered the periodic dues, initiation fees and assessments uniformly required as a condition of acquiring or maintaining membership in the Brotherhood. There was, in short, no cognizable charge that the refusal of the Brotherhood to reinstate petitioners or the discharge by the railroad unlawfully interfered with petitioners' rights.

Insofar as the issues which petitioners now seek to have this Court review were concerned, the complaint at no point referred to the fact that petitioners had become members of the United Railroad Operating Crafts (U.R.O.C.) prior to their withdrawal from the Brotherhood. No mention was made of any proceeding before the System Board of Adjustment of the Pennsylvania or any determination by that Board

that membership in U.R.O.C. did not constitute compliance with the union shop agreement which in fact existed between the Brotherhood and the Pennsylvania. And no claim was made in the complaint that the Board, by virtue of the fact that half of its members were Brotherhood representatives, was biased and prejudiced against the petitioners and did not accord them a fair hearing in dealing with the status of U.R.O.C. under the union shop agreement. Equally absent was any claim that the procedure established by Section 3, First (f) of the Railway Labor Act was an inadequate administrative remedy under these circumstances.

The case was then removed by the Brotherhood to the federal District Court for the Southern District of Ohio. (R. 9a). The Brotherhood and the Pennsylvania both filed motions to dismiss the action. These motions were granted on the grounds that the complaint failed to state a claim upon which relief could be granted and that the court lacked jurisdiction to hear the matter. (Pet., p. 4a).

In dismissing the action, the District Court made certain findings of fact and conclusions of law. (Pet., pp. 1a-3a). The findings of fact were based in part upon the original complaint and in part upon a stipulation (R. 14a-15a) entered into by the parties. Among the findings derived from the stipulation, the court noted that in 1952 the Brotherhood and the Pennsylvania had entered into a union shop agreement. (Pet., p. 2a). The court found that because petitioners had allowed their membership to lapse in 1952 and 1953 they had been cited by the Brotherhood to the Pennsylvania as having failed to qualify for employment

under this union shop agreement. (Pet., p. 2a). The Brotherhood, found the court, had denied reinstatement to petitioners although they had made application therefor. (Pet., pp. 2a-3a).

Finally, the court found that petitioners were members of U.R.O.C. prior to their withdrawal from the Brotherhood and that they had maintained membership in U.R.O.C. to the present date. (Pet., p. 3a). The court noted that the System Board of Adjustment of the Pennsylvania, constituted pursuant to the terms of the union shop agreement, had found upon hearing that membership in U.R.O.C. did not constitute compliance with the said union shop agreement. (Pet., p. 3a).

The action of the District Court in dismissing the action was affirmed on appeal, the Court of Appeals merely citing its own earlier decision in *Pigott* v. *D.T. & I.R.Co.*, 221 F.2d 736 (C.A. 6).

ARGUMENT

Petitioners now seek to bring this case before this Court on certiorari for decision on two issues:

(1) Whether a System Board decision is judicially reviewable where half the members of that Board are representatives of a labor organization charging the petitioners with non-compliance with a union shop agreement, and where petitioners' jobs and seniority rights depend upon whether the Board finds a rival labor organization of which petitioners are members to be "national in scope."

(2) Whether Section 3, First (f) of the Railway Labor Act provides an adequate administrative rem-

edy for a labor organization to be determined to be national in scope.

Petitioners claim that the decision of the Court of Appeals here is in direct conflict with the decision of the Court of Appeals for the Second Circuit in *Rychlik* v. *Pennsylvania R. Co. and Brotherhood of Railroad Trainmen,* 229 F.2d 171, certiorari granted and now pending for argument, No. 56, Oct. Term, 1956. The suggestion is made by petitioners that this case should be heard and decided along with the *Rychlik* case. And it is to be noted that one of the reasons why certiorari was requested in the *Rychlik* case was the admitted conflict between that decision and *Pigott* v. *D.T. & I.R.Co.,* 221 F.2d 736 (C.A. 6), cited by the court below in affirming the dismissal of this action.

But regardless of the citation of the *Pigott* case by the Court of Appeals below and the significance that might be read into that citation, it is apparent that the decision which is sought to be reviewed here is sustainable without reference to the issues which petitioners raise. The District Court concluded, without passing upon either of the issues contained in the petition for certiorari, that "*the complaint* of the plaintiffs fails to set forth claims on which the relief which plaintiffs seek in their prayer can be granted and is without jurisdiction to determine the questions raised by *the complaint.*" (Pet., p. 3a, emphasis added).

As already indicated, the original petition or complaint contained no allegation referring to a union shop agreement between the Brotherhood and the Pennsylvania, the hearing before the System Board

of Adjustment, or the determination by that Board that membership in U.R.O.C. (as to which no mention was made in the complaint) did not constitute compliance with the union shop agreement. There was no charge in the complaint that the System Board was so constituted as to make the hearing unfair to the petitioners or that the remedy provided by Section 3, First (f) of the Railway Labor Act was inadequate. While most of these facts were supplied by the stipulation of the parties and were referred to in the District Court's findings of facts, the critical conclusions of law by that court made no reference whatever to these matters. The court simply said that the complaint, considered by itself and apparently without relation to any of the facts in the stipulation, "fails to set forth claims on which the relief . . . can be granted." And the court added that it was "without jurisdiction to determine the questions raised by the complaint."

In so ruling, the District Court was clearly correct. The complaint is completely devoid of any claim rising to the status of a cause of action, a defect which petitioners belatedly recognized when they entered into the stipulation. It is little more than a collection of baseless assertions that the refusal of the Brotherhood to reinstate the petitioners was unlawful and that the Brotherhood in some way forced the Pennsylvania to discharge them. Entirely absent was any allegation that would be essential to the proper assertion of petitioners' rights under the Railway Labor Act, such as that (1) they had tendered the required payments to the Brotherhood, or (2) their membership in the Brotherhood had been denied or terminated for some reason other than the failure to tender the

required payments, or (3) they were members of some other labor organization national in scope organized in accordance with the Act and admitting to membership employees of their craft or class. There was not even a charge that membership in the Brotherhood was a necessary requirement for employment with the Pennsylvania, an omission which was significant in light of the subsequently-developed fact that a union shop agreement as sanctioned by the Act was in existence between the Brotherhood and the Pennsylvania. The District Court thus had no alternative but to dismiss the case for failure to state a cause of action in the complaint.

The issues which petitioners now seek to raise relate to a cause of action completely different from that contained in the complaint which the District Court found inadequate. That complaint was grounded on the erroneous belief that it was unlawful per se for the Brotherhood to refuse reinstatement to an employee who had voluntarily let his membership lapse and for the Pennsylvania to discharge such an employee. But petitioners no longer make that claim. They now assert that they have been members of U.R.O.C. and that such membership was adequate under the union shop agreement to prevent their discharge. And, more importantly, they now allege that the procedure established under the Railway Labor Act for determining the status of U.R.O.C. under the agreement was unfair and inadequate. The whole theory of the cause of action has shifted from the denial of reinstatement by the Brotherhood to the unfairness of the statutory procedures for determining the status of other labor organizations under the union shop agreement. Pre-

sumably, the relief now sought is judicial review of the System Board determination rather than reinstatement in the Brotherhood.

Under these circumstances, it is appropriate for this Court to disregard such a fundamentally different cause of action which was not properly raised in the complaint or in some other pleading. *Pennsylvania R. Co.* v. *Public Utilities Comm.*, 298 U.S. 241, 249; *McGrath* v. *Manufacturers Trust Co.*, 338 U.S. 241, 249. To warrant this Court's attention, an issue should stem from something in the case more substantial than a stipulation of facts which was unused by the trial court in dismissing the cause of action.

The action of the District Court in holding the complaint as filed to be fatally defective was plainly correct without reference to any of the issues or causes of action implicit in the stipulated facts or which petitioners may have raised in the Court of Appeals and which they now seek to raise here. It follows that the affirmance of the District Court's action by the Court of Appeals can also be sustained without reference to the issues in the petition for certiorari and without reference to the cited *Pigott* decision.

CONCLUSION

It is thus apparent that the judgment below is sustainable on grounds which do not merit review by this Court on certiorari. The fact that the respondents may not have raised this point in the court below or that the Court of Appeals may have based its affirmance on other grounds becomes irrelevant under these circumstances. *Langes* v. *Green,* 282 U.S. 531, 535-539; *Walling* v. *General Industries Co.,* 330 U.S. 545, 547. The petition for a writ of certiorari should accordingly be denied.

Respectfully submitted,

HENRY KAISER
EUGENE GRESSMAN
1701 K Street, N.W.
Washington 6, D. C.

WAYLAND K. SULLIVAN
Assistant General Councel
Brotherhood of Railroad Trainmen
Cleveland 13, Ohio

JAMES A. CULBERTSON
First National Bank Bldg.
Cincinnati 2, Ohio
Counsel for Brotherhood of Railroad Trainmen.

September 19, 1956.

APPENDIX

APPENDIX

APPENDIX

COURT OF COMMON PLEAS
Hamilton County, Ohio

HERBERT S. MILLER, 703 Delta Avenue, Cincinnati, Ohio, for the benefit of himself and all persons similarly situated, *Plaintiff,*

vs.

J. J. GILLIECE AND W. K. WELLS, personally and as representatives of all members of the BROTHERHOOD OF RAILROAD TRAINMEN AND THE PENNSYLVANIA RAILROAD, *Defendants.*

No. A146341

Copy Filed Jan 12, 1955

Elmer F. Hunsicker, Clerk of Court

Petition

Plaintiff complains of the defendants, and each of them and for his cause of action alleges that:

1. The plaintiff is an employee of the defendant, the Pennsylvania Railroad, and has been employed as an operating employee by the defendant company for a period of more than five (5) years and was employed until January 7, 1955, as a trainman on its railroad lines, principally on its lines running out of Cincinnati, Ohio; plaintiff also complains as an employee of and on behalf of and as a representative of other employees of the Pennsylvania Railroad, who are operating employees, who are so numerous that it is impracticable for them to appear before the Court, not herein specifically named and set out as individual plaintiffs, or as employees, and as representing many of the employees of the said Pennsylvania Railroad Company, who are too numerous to be set forth herein as parties plaintiff, as a class in this action, all of whom have a vital and great interest in this cause of action, and

who are greatly affected and concerned in all of the facts alleged below.

2. The Brotherhood of Railroad Trainmen (hereinafter referred to as the B. of R. T.), is a labor organization, certified under the Railway Labor Act to represent operating employees of the Pennsylvania Railroad employed to operate its trains on its railroad lines, with offices in the City of Cleveland, State of Ohio, and with local lodges or local unions in many parts of the country, including Lodge No. 148, in the City of Cincinnati, Ohio; the defendants, J. J. Gilliece and W. K. Wells, are members of and officers of B. of R. T. and of the said Local No. 148.

3. In addition to the individual defendants named herein, all of the members of the aforesaid B. of R. T. are so numerous that it is impracticable and impossible to bring all of them before the Court; that all other members of the aforesaid B. of R. T. not herein specifically named and set out as individual defendants or as members of and as representing all of the members of said labor organization and who are too numerous to be set forth herein, as well as all the officers, agents, servants and employees of the aforesaid labor organization are hereby made parties defendant as a class in this action; that the defendants, J. J. Gilliece and W. K. Wells, are made defendants in their individual capacities as officers of the Local Lodge No. 148 of the B. of R. T., and as members of and as representing all of the members of the aforesaid B. of R. T., and have been joined as parties defendant herein in their aforesaid representative capacities to defend this cause for and on behalf of all the members of the B. of R. T.

4. The defendant, the Pennsylvania Railroad, is a corporation maintaining railroad lines in several states and authorized to maintain railroad lines in the State of Ohio and the County of Hamilton, and is engaged in the busi-

ness of an interstate carrier of freight and passengers, and employs the plaintiff and his fellow employees associated with him in this action as operating employees.

5. The plaintiff and other employees of the defendant company during the years 1952 and 1953 allowed their membership in the B. of R. T. to lapse, and were cited by the defendant labor organization for non-membership; the plaintiff and his fellow employees have applied for reinstatement in the defendant B. of R. T.

6. The defendant, B. of R. T. has refused to reinstate the plaintiff and his fellow employees and has denied them membership, regardless of their application for membership or reinstatement.

7. The defendant, the B. of R. T. and the individual defendants forced the Pennsylvania Railroad Company to discharge the plaintiff and his fellow employees, to their great damage and irreparable injury although the defendant B. of R. T. denied them membership in violation of the Railway Labor Act, U. S. Code, Title 45, Chapter 8.

8. Plaintiff says that the Pennsylvania Railroad by letter dated January 7, 1955, gave notice that at the close of the tour of duty on January 7, 1955, plaintiff was being dismissed from the service of the Pennsylvania Railroad, that said letter was not received until after January 7, 1955.

9. The defendant B. of R. T. has denied the plaintiff and his fellow employees reinstatement and membership in said labor organization and caused their discharge for such lack of membership in said B. of R. T., contrary to the Railway Labor Act, supra, which provides in Section 2, Eleventh (a) that membership in a labor organization cannot be required as a condition of continued employment

> "With respect to employees to whom membership is not available upon the same terms and conditions as are generally applicable to any other member or

> with respect to employees to whom membership was denied or terminated for any reason other than failure of the employee to tender the periodic dues, initiation fees, and assessment—uniformly required as a condition of acquiring or retaining membership:"

the plaintiff and his fellow employees have received notice of their discharge from the defendant, the Pennsylvania Railroad.

10. The defendant, the B. of R. T. and the individual defendants named above, have entered into an unlawful and illegal combination and conspiracy among themselves and others acting in concert with them for the following purposes:

> To cause the defendant the Pennsylvania Railroad to discharge the plaintiff and his fellow employees in violation of their rights under the Railway Labor Act;
>
> To cause the discharge of the plaintiff and his fellow employees for non-membership in the B. of R. T. when such membership was denied in violation of the Railway Labor Act.

11. By reason of the aforesaid unlawful conduct of said defendants, the plaintiff and his fellow employees were on the 7th day of January, 1955, deprived of their employment and greatly injured to their excessive loss.

12. The commission of said unlawful action results in substantial and irreparable injury to the plaintiff and his fellow employees in that they are presently being deprived of their livelihood, and the granting of necessary relief herein prayed for will inflict no injury upon the defendants.

13. The plaintiff and his fellow employees have no adequate remedy at law or in equity by which the defendant

railroad company can be immediately stopped from preventing the plaintiffs earning their livelihood.

WHEREFORE, the plaintiff prays the Court:

1. That a temporary mandatory injunction be issued without notice against the defendants and each of them, the officers, agents, representatives and employees and members of the B. of R. T. and against the defendant the Pennsylvania Railroad and against all persons now or hereafter aiding or abetting them, enjoining and restraining such persons and each of them from

(a) discharging or suspending the plaintiff and his fellow employees for non-membership in the B. of R. T. until they have been given the opportunity for re-admission or membership in said labor organization under the same terms and conditions as are available to any other member.

(b) Discharging or suspending the plaintiff and his fellow employees from their employment with the said defendant, the Pennsylvania Railroad.

(c) Discriminating against the plaintiffs in any manner insofar as their seniority rights are concerned.

(d) That the defendant, the Pennsylvania Railroad, return the plaintiff and his fellow employees to their regular employment, with full salary and wages and their regular hours of employment and with seniority rights, in the railroad lines operated by the defendant.

2. That a date be fixed for a temporary injunction hearing herein after due and personal notice thereof shall have been given to such persons and in such manner as the Court shall direct and that upon such hearing, a temporary injunction against the defendants and each of them; and the officers, agents, representatives and employees and the members of the B. of R. T., and the defendant the Pennsylvania Railroad as specifically prayed for under Paragraph 1 of this prayer.

3. That upon a final hearing this Court will grant and issue a permanent injunction against the defendants and each of them and the officers, agents, representatives and employees and the members of the B. of R. T. and of the Pennsylvania Railroad and each of them and against all persons now or hereafter aiding or abetting them, or any of them, enjoining or restraining them and each of them as prayed for under Paragraph 1 of this prayer.

4. Plaintiff further prays for such other and further relief to which he may be entitled in the premises and for his costs herein expended.

/s/ Geo. A. Lutz
Attorney for Plaintiff

State of Ohio }
Hamilton County } ss:

Herbert S. Miller being first duly sworn, says that he is the plaintiff named in the foregoing petition and that the statements contained therein are true.

/s/ Herbert S. Miller

Sworn to before me and subscribed in my presence this 11th day of January, 1955.

/s/ Geo. A. Lutz